UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE:	.	Case No. 08-35653 (KRH)
	.	
	.	Chapter 11
	.	Jointly Administered
CIRCUIT CITY STORES,	.	
INC., et al.,	.	701 East Broad Street
	.	Richmond, VA 23219
	.	
Debtor.	.	
	.	November 4, 2010
. . . . .		1:30 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	Tavenner and Beran, PLC By: PAULA S. BERAN, ESQ. LYNN L. TAVENNER, ESQ. 20 North Eighth Street, 2nd Floor Richmond, VA 23219
	Pachulski Stang Ziehl and Jones LLP By: ANDREW W. CAINE, ESQ. 10100 Santa Monica Boulevard Los Angeles, CA 90067-4100
For Kimco Realty Group and Inland Groups:	Christian and Barton LLP By: A.C. EPPS, JR., ESQ. 909 East Main Street, Suite 1200 Richmond, VA 23219-3095
For DIRECTV:	Williams Mullen By: W. ALEXANDER BURNETT, ESQ. 200 South 10th Street, Suite 1600 Richmond, VA 23219

Proceedings recorded by electronic sound recording, transcript produced by transcription service

---

J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

COURTROOM DEPUTY: All rise. United States Bankruptcy Court for the Eastern District of Virginia is now in session. The Honorable Kevin R. Huennekens presiding. Please be seated and come to order.

COURT CLERK: In the matter of Circuit City Stores, Incorporated, hearing on matters as set out in proposed amended agenda.

THE COURT: All right, Ms. Beran. Let me apologize to you for that interruption. Apparently, the recording system had stopped completely. So, unfortunately, everything you've already said is not on the record and you may want to start over. I'll let you repeat anything you think you really want on the record. Obviously, I heard what you said and so I'll leave it to your discretion, you know, how you want to restart this matter.

MS. BERAN: Thank you, Your Honor. May it please the Court. Once again, for the record, Paula Beran of the law firm of Tavenner and Beran, as well as Lynn Tavenner of Tavenner and Beran. We are here before Your Honor as counsel for the Circuit City Stores, Inc. Liquidating Trust acting through its trustee, Alfred H. Siegel. Also with us today from a counsel's perspective on the telephone is Mr. Andrew Caine of Pachulski Stang law firm.

There is one matter in these bankruptcy cases before Your Honor this afternoon and that's the motion for an order

establishing procedures for avoidance action adversary procedures. In connection with that, Your Honor, there were four responses filed. As previously indicated to the Court, I will address the concerns raised in each of those responses in connection with my context of explaining to the Court the procedures as proposed, the basis for the same, and any slight modifications that we would represent to the Court and would address in connection with the order, and the modifications really go more to misinterpretations and/or unclarity based on reading responses of that's not really what was intended kind of modifications.

To start off with though, Your Honor, we -- the trust does want to let the Court, as well as all parties in interest in these bankruptcy cases, know that the trust doesn't believe that there's just one set of correct procedures. Furthermore, the trust is very sympathetic to the concerns raised by the respondents and/or are there any other concerns that may be out there. In fact, you know, till about Sunday evening, many of these respondents were constituents of the counsel for the committee who was on the line, as well as standing before you. So, we're sympathetic.

We're trying to accommodate but at the same time the trustee acting on behalf of the trust does have fiduciary duties to these estates and in connection with the same, the trust does believe that the set of procedures before Your Honor

makes the most sense subject to the modifications I will talk about, under the circumstances of these cases. That's not to say that they were the best in other cases and that other procedures haven't worked in other cases. We're confident they have and, in fact, both my law firm and our co-counsel's firm has been involved under different procedures, but we tried to modify and/or adjust accordingly, given the circumstances of these cases.

With that being said, Your Honor, first and foremost, we would make it clear that all of these procedures would be without prejudice for a defendant to come in and seek modifications for cause. But, given the very fact of these fiduciary duties of the trustee that I speak of, as well as that, at this point in time, Your Honor, it looks like there could be up to or even over 600 adversary proceedings. We believe it more appropriate to have procedures in place for all and then let the exceptions come back to Your Honor for -- to seek additional relief.

Briefly, Your Honor, the procedures provide for a case-specific summons as Your Honor's well-aware. Summonses that are normally issued in this Court provide a pretrial, as well as some other things. We would propose that has been used -- a summons that has been used in other cases where there have been a number of adversary proceedings filed -- what commonly we practitioners refer to as a case-specific summons. In

addition, Your Honor, given the volume of the cases, the procedures propose that there will be additional time in which to serve the summonses. And then in connection with service of the summons, to be fair to the defendants, the procedures provide that the answer period would be based upon the issuance of the summons and not -- I mean, the service of the summons and not the issuance of the summons.

Similarly, Your Honor, the procedures provide that the parties can stipulate to an extension of time for the defendants to respond to the complaint without having to come in to Your Honor and seek leave of Court each and every instance. But, it's a set period of time because in all fair candor to the Court, we recognize that we are proceeding in the Eastern District and the fact that the Eastern District is notorious and think that it -- for good reason -- to move cases along.

In connection with these procedures, Your Honor, there is also a stay of requirement to conduct scheduling conferences under the Rule 26(f), as well as the requisite local rules. I think that makes sense in connection with the next phase of the procedures that I will discuss, specifically the mediation procedures. Similarly, Your Honor, there is a provision that stays discovery for a period of time to allow mediation to move forward and, thereafter, if mediation is not successful or if the cases are not otherwise settled, then

under certain triggers, they're -- the discovery is then triggered.

Once again, Your Honor, we are not standing before you saying there will never be an exception to that rule. There could be instances where there may be a need to have some discovery, but what we're saying, this is all once again without prejudice for a party to come in and, for cause, seek modification.

The mandatory mediation procedures, Your Honor, they're -- we tried to balance the need for specificity, as well as recognize that flexibility is beneficial, as well. But, we did want all parties to know, in essence, the rules of the game, but with the hopes that everybody would be flexible and do it in a manner that was mutually beneficial to the parties so that mediation either could be successful on a cost-effective basis and/or at a point in time when mediation was not, we could move to the other stages of litigation.

So, in connection with the same, Your Honor, within 60 days after the defendant has filed its response, there needs to be mediation having been commenced, specifically that would be agreeing to a mediator. And the counsel has proposed a list to Your Honor but we would respectfully submit to the Court that, you know, that list is a proposed list. It is a Court-approved list. We do believe that the list is representative of all parties' interests. Your Honor, I think,

is aware of most of the people, if not all the people, on that list. We tried to get people from smaller firms, as well as larger firms. Nonetheless, we believe everybody on that list does have significant experience in the avoidance action area and believe that any and all of them would be excellent mediators in connection with the adversary proceedings that we intend to file here and starting more than likely this afternoon.

There is a -- our drafting does seem to have let a bit of misinterpretation, specifically where it says, “If any defendant does not timely select a mediator, then the plaintiff shall promptly assign a mediator to the case and so notify the defendant.” That was really addressed at, Your Honor -- to the extent, the defendant -- we hadn’t heard from a defendant. So, to make it abundantly clear, that would be the case if we don’t hear from a defendant. However, if it’s an instance where the defendant wants one mediator and the plaintiff believes that another mediator would be beneficial, we would submit we’ll agree to the defendant’s mediator because I just represented to your Court and surely believe it, all the mediators on the proposed list are excellent mediators and we’d be happy with any one of them. So, that would be one thing that we would want to make clear.

In addition, Your Honor, then there are additional procedures for mediation. At least ten days prior to the

scheduled mediation, the parties shall exchange position statements and shall submit the statements to the mediator. The position statements have a specific length to them and the mediator at his or her discretion may require additional information after receiving the papers. The mediator's fee shall be split equally by the parties and payment arrangement satisfactory to the mediator must be completed prior to the commencement of the mediation.

The mediator will preside over the mediation with the full authority to determine the nature and order of the parties' presentations. In addition, once again, in the need to try and be flexible, the mediator may implement additional procedures which are reasonable and practical under the circumstances, recognizing that there isn't one fit for everything. We've tried to have some flexibility in connection with the same.

The parties will participate in the mediation as scheduled and presided over by the mediator in good faith and with a view towards reaching a consensual resolution. In connection with the same, we want to make it clear that there shall be people with authority to settle at the mediations. However, to the extent the mediator believes that it's necessary and/or appropriate, once again building in some flexibility, the mediator at his or her discretion may allow a party represented to appear telephonically.

The -- once again, Number 6 just provides for some flexibility as it relates to the mediator's conduct of the respective mediation. All proceedings and writings incident to the mediation will be considered privileged and confidential and should not be reported or admitted into evidence. We want to encourage openness and candor in connection with trying to get to a resolution.

The mediation must be concluded no later than 120 days after the date in which the debtor -- excuse me -- the defendant has filed its response to the complaint. And similarly, Your Honor, then there is Number 9, provides certain mechanisms to the extent anybody's abusing the process to come in before Your Honor and seek some type of summary judgment and/or a motion to dismiss. Within ten days after the completion of the mediation, we have a trigger mechanism proposed so the mediator will file a report and that report then can trigger some other events, specifically the scheduling of pretrial conferences and other things associated with discovery and the like.

That concludes specifically the mediation-type procedures that are being requested today. In addition, Your Honor, there are some additional procedures related to these adversary proceedings, specifically that pretrial scheduling conferences and motion hearing dates will be on dates that are omni dates established with the Court's scheduling clerk, so

that all parties know that up front and aren't anticipating having to come in at some other date.

In addition, Your Honor, we do seek the relief that a motion affecting all adversary proceedings may be filed in the main case, as opposed to in each individual adversary proceeding, with the caveat that notwithstanding that it's filed in the main case, all defendants shall receive notice of that pending motion. In addition, Your Honor, they want to make it abundantly clear that the Court's -- unless specifically overridden by these procedures, the Court's case management order as amended will still remain in full force and effect. And finally, Your Honor, we have a requirement that these procedures -- notice of these procedures and the procedures themselves must be served with -- served on each defendant with the summons and complaint in each adversary proceeding so that everybody knows the rules of the game.

In connection with the responses, Your Honor, and instead of going through each response, because some of them have overlapping issues, I've kind of tried to lump them together to address each accordingly. In connection with the mediation, when it wasn't explicitly clear in that -- it is contemplated, Your Honor, for the most part, that these mediations will take place in Richmond. In connection with that, we -- the trust believes that's the appropriate. These cases are pending here. The trust representatives are many of

the former employees of the debtor -- not -- most of the trust representatives are former employees of the debtor so they're here in Richmond. Your Honor, we've also in discussing with the proposed mediators -- there's an agreement that they will not be charging for actual travel time. So, for those reasons, we are contemplating that most of them will be in Richmond.

Once again, though, Your Honor, we would emphasize that we are flexible and we will work -- and if it makes sense and it's in the best interest of the estate to agree on a one-off basis to have these mediations held someplace else, we represent to Your Honor that we will do that. But, it has to be in the best interest of the estate. I would also add, Your Honor --

THE COURT: Well, the party -- when you were talking about earlier that these procedures would be without prejudice to any party seeking modification for cause, if there was a disagreement between the trust and the party, would the party be free to file a motion with the Court to ask that the mediation be conducted in some other place?

MS. BERAN: Absolutely, Your Honor. At that point in time, if there was an agreement on that, absolutely. And I would note for Your Honor in connection with that, one of the mediators on the list, whether he -- if he's an approved mediator -- did let us know that he does have offices in California. And he would not charge for his travel time if it

makes sense to do it out on the west coast. In addition --

THE COURT: Which one was that?

MS. BERAN: That is Mr. Wasserman --

THE COURT: Okay.

MS. BERAN: -- of the Venable firm.

THE COURT: Very good. Thank you.

MS. BERAN: But, he specifically contacted us and informed us of that and asked -- indicated that we would make the same representation to the Court.

THE COURT: Thank you.

MS. BERAN: Based on that, Your Honor, we believe we've addressed the concerns and either addressed them and/or have taken consideration of them and believe that the procedures we've proposed are appropriate under the circumstances and -- but are, of course, willing to modify as the Court deems appropriate.

Similarly, Your Honor, and I guess this is maybe the overlapping -- most overlapping issue is the proposed cost sharing with this kind of overlying theme that these are -- it's being proposed as a leverage issue. In fair candor, Your Honor, it was not contemplated as a leverage issue. We don't believe it is a leverage issue. At the end of the day, if it ultimately does play a role, it was not the intended role. The reason why we did that, Your Honor, is -- proposed it or suggested it, is the trust -- the trustee acting on

behalf of the trust has a fiduciary duty now to maximize return to creditors. And part of that is minimizing costs.

It's not like the trust, through the trustee, is going to go out there and sue on frivolous causes of action. Unfortunately, whether we like it or not, Congress has said under certain circumstances, this is a preference and they should be looked at, examined, and if it makes a cost benefit to the estate to pursue, they should be pursued. So, yes, we concede -- I don't think there would be anything other than conceding -- that we will be the ones -- the plaintiff will be the one suing, but nonetheless it's suing based on something that Congress thought appropriate.

I can also represent to Your Honor here -- and while this is not in the pleadings, I can represent it myself as having reviewed a substantial number of these pleadings now, as well as then, in discussions with co-counsel, as well and representatives of the trust -- that the suits that will be filed here, starting shortly. There is a $20,000 combined exposure. And when I say 20,000 combined exposure, it's preference plus AR of 25 of exposure. And specifically, when we say preference, that has been vetted for new value, so it's net of new value.

So, the concerns that we may be suing for something just over the statutory limit provided by Congress in a manner that isn't cost efficient or cost effective is, while I

understand, may have been a concern without information or knowledge, I -- based on the representation, that's not going to happen. It's not like there's going to be a 10,000 suit where there's 9,000 of potential new value and we're trying to extract something for something more.

Your Honor, in fair candor, we will concede that in other jurisdictions and other cases that there isn't the sharing. There are -- there is sharing in other jurisdictions and we believe under the circumstances before Your Honor and under these cases that this sharing makes the most sense.

Many of the -- I think it's three of the four respondents indicated that there should be some type of opt-out procedures, and I think there were really two categories of opt-out procedures suggested, one for smaller matters. There should be a threshold of which the mediation is not required.

Well, in all fair candor, I think we could stand up here before Your Honor and argue back and forth. In some respects, it's those cases that even need mediation sometimes more so than the larger ones because unfortunately in those situations, you're dealing with a client maybe who doesn't understand the nuances associated with preference law, who says this is wrong. What are you telling me? I'm owed money from this entity and now I have to give some money back? I mean, Your Honor has experienced that, I've experienced -- everyone in this courtroom has experienced that. And sometimes, it is

just beneficial for an independent third party to look at your client and say, unfortunately, although it's unfair that is what the bankruptcy code provides. So, we respectfully submit that there really doesn't need to be specific out-out or a threshold issue for the smaller matters, especially given what my representation of those suits that are going to be filed in general.

Similarly, Your Honor, there is some concern that there should be opt-out procedures for larger, more complicated cases that might not all otherwise be amenable for mediation. Once again, Your Honor, we're here before you saying we want to come up with procedures and establish procedures for the majority of the cases. We recognize that there may be unusual circumstances where mediation just is not going to work, and under those circumstances, once again, Your Honor, we've said this is without prejudice for a party to come back in to Your Honor and explain why it just doesn't make sense in this one instance.

Another category of concern and/or objection is the concept of staying discovery and the procedures really do intend or try to encourage informal discovery, informal exchange of information. And from the plaintiff's perspective, that's the only way mediation works, is that that information is exchanged voluntarily. Let's get it before we have a lot of expenses associated with depositions, drafting of

interrogatories, request for admissions. Let's informally exchange the information and that, kind of, is the concept behind Rule 26. It's the concept -- this concept of good faith, good faith, exchange that information. Rule 26 provides for that. Our local Rule 726 provides for that, as well as our local Rule 9013. All of those rules talk about this concept of good faith. And we represent to Your Honor that the plaintiff absolutely will stand before you in every instance, exercising that same good faith and that's what these procedures are intended to encourage and facilitate.

But, finally, Your Honor -- and I don't mean to keep beating a dead horse -- once again, though, if under appropriate circumstances it makes sense for there to be some formal discovery before the mediation, it's without prejudice to any party to come back in before Your Honor and explain those -- the circumstances which would warrant the same.

In addition, Your Honor, there was a concern that the exchange of the position statement should be not just to the mediator but should be shared between the parties. Understanding that's done in other mediations, understanding that sometimes mediators prefer that, we would respectfully submit in all humble experience when you have that exchange, the document becomes more of a posturing statement and you're not as willing to show that you recognize your weaknesses and/or strengths and it's mainly -- we have all these

strengths. And we would respectfully submit that parties may be more -- and their counsel may be more inclined to get to the heart of the matter by exchanging those between counsel and the parties, as opposed to just submitting them to the mediator for his or her eyes only.

There were concerns that some of these procedures may be premature. We would respectfully submit once again that they're not premature. In fact, Your Honor, more than likely as soon as an order is entered, there will be adversary proceedings starting to be filed. And we need procedures in place before the adversaries are filed, for example, and, you know, like we discussed of the summons. If procedures aren't in place, the normal Court's procedures are going to issue the summons pre-trial until we have a modified summons, a modified answer. The trustee, asking on behalf of the trust, thought it was inefficient to address certain of the procedures now and others of the procedures after the filing of the complaints, and therefore, we respectfully submit that the procedures are not premature, that they're actually ripe and should be considered and approved by Your Honor.

Finally, Your Honor, I think -- and I'm summarizing -- I mean, I'm happy to address any concerns raised after each of the respondents stands up, but I think the last category of issues raised in the responses were that there appeared to be a short timetable to accomplish all the mediations that needed to

happen. The 60-day window was too short and that something more along the time line of 90 was necessary.

Your Honor, we recognize it's a short timetable. We're cognizant of that. While we all would like more time, in fair candor to the Court, we recognize these cases are going to be pending in the Eastern District and the Eastern District does like to maintain control over the docket and move the docket along. And we thought it appropriate given the fact that there have been extensions to otherwise normal rules in the Eastern District that a 60-day time line was appropriate. I can tell you this, that the mediators -- we have discussed with all of the mediators except one but we spoke with someone in his office and they are ready, willing and able so we believe we have enough mediators in place to handle the volume. The trust representatives will be available and counsel from the plaintiff's perspective will be available to answer questions, return calls and the like to make this process be as efficient as possible.

But, under the extraordinary circumstance, once again, if there needs to be some additional flexibility for whatever reason, the mediation hasn't occurred, it's without prejudice for either the plaintiff or the defendant to come back in -- or maybe both -- to come back in before Your Honor and explain why additional time may be necessary to finalize and/or conclude mediation.

With those addressed, Your Honor, we respectfully submit that based -- with the modifications as proposed to clarify intent on procedures and make sure everyone's on board, that the procedures before Your Honor are warranted and the best under the circumstances currently before Your Honor.

THE COURT: All right. Before you sit down, one of the things I would like you to address, you -- when you were talking about the fee splitting requirement and some of the objections been raised there, too. I believe it was the Inland Managing and the entities had proposed in the alternative that if the defendant was the ultimate prevailing party in any subsequent adversary proceeding trial that they get the mediation fees reimbursed. What would the estate's position be on that type of a modification?

MS. BERAN: Well, first and foremost, Your Honor, from the estate's perspective is the estate through, you know -- its professionals are analyzing these. Now, in connection with the actual causes of action, you can analyze that. In addition, as Your Honor knows, you can analyze some of the affirmative defenses but you can't completely analyze all of the affirmative defenses.

And so, from the first -- for the first perspective, it would seem that if it was on an affirmative defense that wasn't otherwise known or should have been known to the estate, that would seem to be -- of course, establishing up front that

there is a basis to have the cost splitting be the procedure -- that would seem to cut across the rationale. But, nonetheless, I can represent to Your Honor that, to the extent that -- we're here. We're trying to meet fiduciary duties and make sure that the trust acting on -- trustee acting on behalf of the trust is meeting his fiduciary duties. If it's -- the Court believes it's appropriate that there be that type of provision, the trustee absolutely would agree to the same, because -- but at least at that point in time, he has at least exercised fiduciary duty and has been told by an appropriate authority that now there will be some type of cost sharing.

THE COURT: All right. Thank you.

MS. BERAN: Mm-mm.

THE COURT: All right. Does any party wish to be heard in connection with the motion? Mr. Epps?

MR. EPPS: Good afternoon, Your Honor. A.C. Epps, Jr. -- excuse me -- on behalf of two different groups of objectors. I am here for the Kimco Realty Group. I am also here on behalf of my associate, Jennifer McLemore, with regard to the Inland Group which was filed by her.

Your Honor, I will try not to be scattershot in my approach about this, although to a certain extent by necessity the pleadings themselves were somewhat scattershot, picking and choosing things that we wanted the Court to refer to. I hope the Court will understand that if I skip something in the oral

argument that is in our pleading it is mostly out of time pressure and not because I have laid it by the side of the road because there are a couple of things I particularly want to talk about.

First and foremost, Your Honor, a fundamental problem with these procedures is the mediation costs. I don't blame the trustee for giving this a go, to try not only to sue 600 people in a week, but -- and not only to require that they go to mediation which I'm not necessarily against, but to say, and by the way, I'm suing you and you will have to pay half of the mandatory mediation and you will have to make satisfactory arrangements for payment with the mediator before you have a mediation and if the mediation doesn't occur in a given period of time, we're going to seek a default judgment against you.

I think that while bankruptcy is -- has many judges in many courts and I suspect it's true that the trustee may be able to find a Court -- indeed I think Mr. Schwarzschild's pleading has a Court. I think Collins and Aikman did this and split the mediation cost. The overwhelming weight of cases has said what Judge Walrath's general order in Delaware says, which is you debtor, you liquidating trust, you owner of the rights to bring these avoidance suits are bringing them, you're doing the weighing of them, and you will pay the mediation costs. I think that that is appropriate but I think it's fair and I don't think the other approach is fair. They're the ones who

need to weigh the cases and decide which ones to bring and if a case is worth bringing and it needs to be mediated, they should pay the mediation fee.

I realize this is not Delaware. There's only one Delaware, but they sure do have a lot of experience in things like this. But, in case the Court wants to refer to a non-Delaware case with hundreds of these cases filed at the relative last minute that isn't a Delaware case, I refer the Court to the Tousa case with Judge Olson in the Southern District of Florida in which I don't know how many hundred cases that were brought in that case. The number 1200 sticks with me but I don't have the number. But, he was not buying a ticket to this sharing half and half. Indeed, the debtor in that case actually didn't even have the nerve to ask for it, because the logic is overwhelming, that the evaluation process is improved by only bringing cases where the plaintiff believes enough to pay for the mediation.

And I don't think that this Court needs to set some unfortunate precedent in this particular case. The other procedures work perfectly well. That -- it doesn't take a rocket scientist to know that the evaluation process would be more thorough if that were the case. It also -- this Court has practiced law. The Court really knows that if the barriers raised in your defense is higher, then the leverage for settlement on the plaintiff's side is greater.

THE COURT: What kind of evaluation process do you want the trustee to do? I mean, he came into existence on Monday of this week.

MR. EPPS: Well, Your Honor, this case is in a hurry now, because the two-year anniversary is coming.

THE COURT: And a lot of that was delayed because of the Canadian proceedings and having to coordinate with Oran proceedings and the like. That's not right at the trustee's doorstep, is it?

MR. EPPS: I don't disagree. It's not the trustee's fault, necessarily. But, we -- I think it was a ten-month break. It certainly was nine or ten months. And I have a hard time thinking that the debtor -- remember the debtor plan might not have been confirmed and the debtor might have to have brought these things -- that it isn't appropriate to think that someone would have thought of these cases during the ten-month period between when the plan was proposed and when we finally went to confirmation in this case. They are the debtor's causes of action until a plan assigns them to someone else.

Now, it is perfectly possible that we could be here today instead of on this, we could be here on the confirmation date, because Canada wasn't sorted out yet. And I don't think it's appropriate to say that the debtor shouldn't have been doing this. Someone should have been doing this and indeed I think someone was doing this.

But, nonetheless, I think that there is no particular reason to change what I believe to be the established rule in these cases, although there's an exception to almost everything, which is that the trust, that the estate, that the debtor pays the mediation cost.

THE COURT: Well, Ms. McLemore suggested in her pleading that maybe the better way of doing it would be that those expenses would be reimbursed if, in fact, the plaintiff -- or the defendant was the prevailing party in the adversary proceeding. Why wouldn't that be a more appropriate backstop in order to resolve this? It's basically the same question I asked Ms. Beran.

MR. EPPS: Well, I think that the -- that situation does -- has two problems. One is as this Court knows five percent of these go to trial, four percent, six percent, some very small number. Any negotiation, even where it is proved that the trust has essentially, I won't say no case, but their defense is to cover the entire case so that the liability is zero, is going to be settled out and that's going -- a waiver of that clause is going to be part of the settlement. Otherwise, the trust is going to say, let's go. We have nothing to lose at that point. They're getting paid. They've got nothing to lose if someone on our side says we're down to zero and we want you to pay the cost of mediation. Absolutely nothing to lose.

And while both of those pleadings were filed by us -- one with our local counsel and the second one with mine -- I don't think that it's appropriate to wait till the end of the line to determine that. I think that's maybe a fall back position but I don't think it's the right position. The right position is Judge Walrath's position, which is they're bringing the case, they're picking and choosing, they pay the mediation.

Now, settlements may say you're going to pay 20 percent of your liability and the settlement is going to add to it as the required term, half of the mediation cost. That could be a subject for settlement discussions. But, you're clearly talking about leverage here and I think the leverage platform needs to be level. I don't think it's appropriate for the Court to go off and give this extra bonus which most Courts don't.

I'd like to go ahead with the others. I'm happy to answer all the questions the Court has but I -- that's the strongest objection we have and I think it's a big, big thing. And I do direct the Court to Judge Olson's order in which -- it's non-Delaware if the Court doesn't want to read the little -- saying if Delaware does it, we must do it. There are others that are doing it too and I recommend Judge Olson in that respect.

Your Honor, I appreciate Ms. Beran's representation as to the de minimis exception to the mediation requirement.

Whether it's at the right level or not is something that I haven't exactly been able to react to because I just heard about it. But, I do want to point out what the costs of mediation are going to be to a defendant. Now, if I represent a defendant who is sued for a net preference of $21,000, I think it's fair to say that the mediation cost including the statement and so forth while it might cost less than $5,000 to get ready for the mediation and do it, the Court knows that it very easily might not. So, I have picked $5,000 as a reasonable effort for purposes of my discussion today.

There needs to be someone here from out of town unless there's a waiver, someone who can make a decision not to mention that person is out of the office for that day. I realize that you can apply to the mediator for a waiver from that and I would hope that the mediators would be reasonable in that regard. But, there's no requirement that the mediator agreed to that.

THE COURT: Well, according to Ms. Beran, you get to pick which one of the mediators you want.

MR. EPPS: But, I can't ask him that question before I pick him. I can't take a poll to see who will let my person stay in Pocatello, Idaho, but I'll have to take my chances.

THE COURT: But, I assume you know all of the six -- the bulk on that list, as well as I do.

MR. EPPS: Well, I do. But, I don't know the answer

to that question. I do know all the mediators and I have no objection to the mediation list, at all. I'm quite pleased with the mediation list. But, I have attributed to that the cost of someone being here for day and someone traveling here for the day and so forth, another $2,000. I have not added half the cost of the mediator in the hopes that the Court will not adopt the trustee's approach in that respect. But, I think it is inconceivable that half a share of a mediation is going to be less than $1500 and it could be a great deal more. Some of the people on that list are quite expensive and I would hope the smaller cases would not get the most expensive mediators.

But, nonetheless, even the numbers that I have given you, now we have a $21,000 case and its $8,000 should get past the mediation. Well, the trustee calls you up and said you've got to go to mediation but I'll take five to let you off the hook. Now, that's even without evaluation of the underlying merits of the case. You know, you've got a $21,000 case and you've got 8,000 some to go through a mandatory mediation. I think the level is too low. These smaller cases are not going to be that hard. There may be a hundred of them. We haven't seen them but there may be a bunch of them that are small. But, they're not that hard. And the barriers to get to a decision there are very, very high as I think I've outlined. I don't think I've used inappropriate numbers for that, at all.

So, I suggest to the Court that it suggest to the

trustee maybe the mediator -- the de minimis level is too low. But, I appreciate the gesture on their part and I -- we may get somewhere with that.

Your Honor, I note that the Delaware order requires that documents be submitted -- the initial documents under Rule 26 before the mediation. I worry about going to mediation without knowing what's in the other side's briefcase. It just makes the mediation harder. I realize there can be under these restriction -- I mean, under these procedures, a voluntary swap. I don't know what that's going to mean in real life. I trust Ms. Beran on that completely but I really don't know what that means.

THE COURT: Well, with all these cases being filed, doesn't it make much more sense to let the parties try to, you know, resolve the matter through mediation without having to incur all the expense of the discovery process? Because that -- the discovery is what makes litigation so very, very expensive and let's avoid that. Let's let people do it on a voluntary basis. If it's not working, then in the exceptional case, the parties can come back and come to the Court and say, Judge, we want you to order -- you know, to allow discovery in our particular case because we're not getting what we need and then I can do that on an expedited basis, whatever's necessary in order to move the matter along. But, why isn't that the better approach --

MR. EPPS: It may be --

THE COURT: -- so that you don't add to your $8,000?

MR. EPPS: It may be, as long as there is flexibility in that case on the back end of when we have to be finished by. I think that may be perfectly acceptable as a way to deal with it. Once again, I am a little worried about the 26(a) documentary disclosures in the small case may actually get rid of your small case. And I would hope if it's going to be voluntary only, which is, as I say, contrary to the way some Courts do it, that it's freely volunteered because otherwise we won't know sometimes what it is until we have to go to the mediation and as I said the barriers to getting through that mediation are quite high for someone with a 20 to $30,000 claim situation.

That's the only reason I think we ought to get documents beforehand as a matter of procedure. Now, if the Court is going to see us really quickly and without briefs and long pleadings on this -- remember, once again, we're talking about the small and medium-size cases -- I think that would work.

But, I think that the Court needs to understand the problem. And the problem is that the mediation is very expensive compared to a small claim. And the more we can learn about it, if we've got to do it at a given level, at least we will know. You don't want to go in the other room not knowing

what the other side has in its briefcase. It just doesn't prepare your client for what he needs to do among other things.

A couple of other things, Your Honor. The requirement that the mediation be -- commence 60 days after the responsive pleading is filed, it is fine as far as it goes. This Court likes to keep its docket going. We -- I like to keep dockets going. We like to keep working. It isn't going to happen that way. The other side has got, as they've said, I think 600 pleadings that they're -- I've forgotten the number but it's many hundred. It isn't really going to happen that way. Indeed, you know, it's not this Court's case but in the first Movie Gallery case, two years later they weren't done yet. This stuff takes time on the side of the party that has all the cases and what will happen if we don't have flexibility at the beginning is that the other side, the defendants, will be crowded by the mandatory time limits.

THE COURT: Mr. Epps, I want to avoid exactly what happened in Movie Gallery. I want these cases to be resolved and not two years from now.

MR. EPPS: I, too. I want the defendants --

THE COURT: Because the quicker we --

MR. EPPS: -- to have some chance to react. That's all. I'm worried about plaintiff delay.

THE COURT: The quicker we can get this stuff done, the cheaper it's going to be for everybody.

MR. EPPS: I agree.

THE COURT: And I am a strong proponent of that and to ask for the additional 30 days, you're just, you know -- it's falling on deaf ears up here.

MR. EPPS: All right. No desire to speak to deaf ears.

THE COURT: Good.

MR. EPPS: Your Honor, everything else that I have to say is in the pleadings but I ask the Court not to do the sharing of the mediation, to do what most other Courts do with these mass preference cases. It's the plaintiff's charge and the plaintiff should pay it. Thank you, Your Honor.

THE COURT: Thank you.

MR. BURNETT: Good afternoon, Your Honor. For the record, Alex Burnett, on behalf of DIRECTV. We had essentially just two points in our limited objection, and again, it's limited because we don't object to the procedures -- to the concept of the procedures. We just had two limited points that we wanted to make.

First was that mediation should not commence -- it should not be forced on the defendants until all preliminary motions have been resolved and decided. In other words, if there's a 12(b) type motion, then we don't think that the mediation should commence until that motion has been resolved because it's unfair to force a party over which there is no

jurisdiction or where a complaint fails to state a claim to be forced into mediation until that issue has been resolved.

THE COURT: Why can't that issue, though, be some -- you know, resolved through mediation? I mean, these mediators are going to be -- they've all argued 12(b)(6) motions and why wouldn't they be capable of saying, you know, there's no way that the Court's going to throw this case out as soon as it gets through the front door? And just dispose of it again without having to go through the judicial process of arguing the -- of the motion practice?

MR. BURNETT: So, you're suggesting that the mediator could make a decision that the case -- that the complaint fails to state a claim and therefore mediation's not necessary?

THE COURT: Well, I would assume that if your client is sued and there's no jurisdiction that you're going to raise that issue with the mediator and get, you know, the mediator to try to resolve the case based on that issue, as well as any other issue that might be available to you. But, why not do it through that process, you know, rather than going through the motions process, you know, which can, you know, again add time and expense to the case, especially if it's a slam dunk?

MR. BURNETT: Well, what if there's an issue like a 12(b)(6) kind of issue, where the complaint fails to state a claim or fails to give sufficient detail for the claim? It's possible that it may -- that, in fact, there may not be a valid

claim against the defendant, yet the defendant is still forced into a situation like Mr. Epps just described where they're spending maybe $8,000 in a mediation when, in fact, there's really no -- the plaintiff still hasn't stated a valid cause of action against the defendant.

THE COURT: And I suspect every one of these cases there's going to be some sort of Iqbal-type of reply saying, oh yes, we don't have enough specificity now under preference complaints to know what, you know, we're being sued for and all the rest of it. And you know we can litigate you know 600 times those issues and go on six, seven months resolving all those issues, get it all done, and then the parties will have spent well past the $8,000 that Mr. Epps is concerned about when he came up here before we've even gotten to mediation. And how does that move everybody's ball down the court?

MR. BURNETT: Well, if the plaintiff has to amend pleadings or include additional claims, then they ought to do that prior to the mediation so that everybody knows going into the mediation what the claims are against the defendants, not after mediation is concluded.

THE COURT: All right.

MR. BURNETT: The second point that we had in our objection, and to some extent it may have been resolved by the comments that Ms. Beran made, but we just wanted to ensure that number one, there was -- that there is going to be some sort of

good faith exchange of information between the parties so that the defendants aren't walking into a mediation only to get sandbagged by the plaintiff with -- because it's not only conceivable but it's very likely in these cases that the trust would have information that the defendants wouldn't have, such as details about when payments were -- you know, when payments cleared, financial details that may not be available to both sides.

And in that type of situation, number one, we would like there to be a good faith exchange of information and if circumstances arise where the parties believe that there ought to be -- or one of the parties believes that it, in good faith, needs some formal discovery, the door shouldn't be closed on them to come back to the Court to ask for that. And I understand it from Ms. Beran's comments that this is without prejudice to be able to come back to the Court and ask for that, so you know I think that we would just on our second point we would just ask number one, that the order and the procedures that are approved by the Court reflect that the plaintiff is going to exercise a good faith exchange of information premediation, and secondly, that if circumstances require formal discovery, that the parties are without prejudice to come back and ask the Court for it.

THE COURT: And I think you heard my responses to Mr. Epps that you know the Court certainly stands ready to

entertain those types of motions, if necessary. But, I would like that to be the exception, then, not the rule.

MR. BURNETT: I understand, Your Honor. I think that's okay. Thank you.

THE COURT: All right. Thank you, sir. Does any other party wish to be heard in connection with the proposed procedures in connection with these avoidance actions?

(No verbal response)

All right. Ms. Beran, anything further on your part?

MS. BERAN: Your Honor, just in conclusion, there are no ulterior motives here. We thought that mediation and the procedures proposed, which in some instances this Court has successfully used in this case and other cases pending Your Honor, would be the most efficient manner to address these proceedings and avoid a potential logjam on this Court's already busy docket, as well as on the cases themselves and the -- all parties and interests so that there can be a quicker administration of these estates and a quicker distribution to creditors because that's what the ultimate goal is, is to maximize the value so that there can be a larger distribution to creditors who Congress has said are entitled to distributions under the (indiscernible) by Congress.

We are not wed to anything in particular or there's no pride of authorship. We proposed these procedures in good faith. The trust acting -- the trustee acting on behalf of the

trust believes he has fiduciary duties. Albeit some of them may at times be unpopular, he comes before Your Honor with plain hands proposed them in good faith and we respectfully request that the Court establish appropriate procedures to address the volume of adversary proceedings that are going to be pending here shortly.

THE COURT: All right. Thank you. All right. The Court has before it the motion for an order to establish procedures for the avoidance action in adversary proceedings in connection with the Circuit City Stores bankruptcy case. The Court is going to substantially adopt the proposed procedures that have been suggested by the liquidating trustee. The -- in adopting these, the Court notes that the procedures are adopted without prejudice to any party to seek modification for cause for any of the provisions on a case by case basis. But, these will be the procedures that will be applied generally to all cases and then the exceptions, as Ms. Beran pointed out, can come back to the Court on a one by one basis and that would include requests for discovery if it was necessary in a particular case because the parties weren't able to agree to do it on some sort of voluntary basis. But, I really don't think that that's going to be the case.

With regard to a number of the objections, especially with regard to the fee splitting, that is something that the Court looked at very carefully when I saw the pleadings come in

initially. I saw the responses come in and I have analyzed that and I think that the fee sharing is actually a very good proposal. And while it's not what Delaware does, let me explain my rationale for that. And that is that it gives the defendants in these cases a very vested interest in these cases at the front end which I want them to be able to have. I want them to be engaged. I want them to know that Mr. Epps's $8,000 or whatever it is, is really what's at stake, so that if the case can be resolved for something substantially less than that, that's a good thing. And let's get that done. But, all parties then know there's going to be something at play here that's going to get this done and I want the parties to be firmly engaged in the process to make the mediation work. And so, if they have to pay half of it, they're going to be much more inclined to try to do that. And hopefully, Mr. Epps is right and they're only going to be two percent of these cases that we actually try and if that's the case, that would be a wonderful thing.

I don't want these cases languishing for another two years. I want to see them done quickly. In the Eastern District of Virginia, we do have a policy of trying to get cases through quickly and the concept behind that being that the longer the case goes on, the more expensive it is to all of the parties. And so, I'm not going to extend any of the time periods. I want to see these cases moved promptly. I want the

mediation in these cases to move promptly. And I want the parties to be seriously engaged in those mediations and try to get the cases resolved. But, in any event, I want to see if the cases do need to be tried and be brought back here that things would be working on a fast-track basis.

With regard to the objection to not allowing motions to be filed prior to the mediation, I reject that proposal. I think that the mediator can address issues that would be raised under, you know, 12(b)(6) or 12(b)(1) or whatever other motions or affirmative defenses the parties may want to seek and that the mediator can resolve those much less expensively -- if they're valid concerns being raised -- than if the parties were to come here and we were to engage in extensive motions practice at the front end.

And I think that the mediator's going to be able to ferret out if there's some, you know, amendment to a pleading or something that's going to happen in a case by cutting down the issues. That's something that the mediation process is very good at doing. And yes, we may have to amend pleadings in a number of cases but that may be as a result of the good faith mediation as opposed to then having to go through that process after an expensive motions practice. So, that objection will be overruled.

The -- you know, for all of those reasons the Court is going to adopt the procedures as they have been set forth.

Do I have before me the motion to approve the list of mediators? Is that part of what I have or does that have to be done separately?

MS. BERAN: Your Honor, we -- in all fair candor, we had believed that it was part of the original motion and --

THE COURT: I did, too, as I went through. I just wanted to make sure --

MS. BERAN: -- it was just a subsequent --

THE COURT: -- because I've looked at the list of mediators and they are all very experienced practitioners that are very familiar to the Court and I'm very pleased with them. We did have one objection and that's what I wanted to speak to you about having no west coast mediators, and the fact that Mr. Wasserman has a California office and is willing to travel there at his own expense, the -- if a case -- on a case by case basis. And also, you know, with regard to the situs of any mediation that again if the parties can't agree on that, they can come and seek, you know, some direction from the Court, if necessary. But, I would agree with what counsel said originally that I would expect most of these mediations be conducted in this jurisdiction.

MS. BERAN: Thank you, Your Honor. Your Honor, I did want to apologize if I misspoke and/or misrepresented something. The -- what we've discussed with the mediators and which all of them have agreed to is that they won't charge for

travel time.

THE COURT: Travel time is what I meant, obviously, the airline ticket. But, that airline ticket's the least of anybody's problems and, you know -- as far as the expense element is concerned. But, I understand so I misspoke when I said that.

MS. BERAN: Okay. Well, thank you. And I just wanted to make that clear. I didn't want to --

THE COURT: And I thank you for that clarification. So, these procedures will be approved. I would ask that you put something in the procedures that specifically says, as I believe it was Mr. Burnett that suggested, that it be pointed out in the procedures that it is without prejudice to any party to seek a modification of the procedures in their particular case for cause. And so that they know that they have that right.

MS. BERAN: Absolutely, Your Honor. That's actually already written on my draft of the procedures, and we'll add that immediately to the order that we submit to Your Honor.

THE COURT: Okay. Very good. Obviously, you want to get this order entered as quickly as possible and -- because I know that you have an awful lot on your plate and there are all of two of you and so I will look forward to receiving your order and I will enter it as soon as I get it. Mr. Epps, you have a question?

MR. EPPS: I did have a question, Your Honor. If a cause language is what we're just talking about given that fairly strict time frame, would the language -- could the language have on expedited basis (indiscernible)?

THE COURT: Oh, the Court's open 24-7.

MR. EPPS: No, but I meant the language that goes -- as opposed to the usual 14-day motion (indiscernible), that's all.

THE COURT: Yes. Let's go ahead and put that in there so that everybody understands that they can request it on an expedited basis. I think that's a good suggestion.

MR. EPPS: Thank you.

THE COURT: All right. All right. Anything further, Ms. Beran?

MS. BERAN: No, Your Honor.

THE COURT: All right.

MS. BERAN: Thank you very much for your time this afternoon.

THE COURT: All right. Very good. We've got another matter immediately following yours, so what I'd like to do is just take a very, very brief recess for the other parties to get set up, and then we'll call the next matter. Thank you.

COURT CLERK: All rise. Court is now in recess.

* * * * *

C E R T I F I C A T I O N

I, STEPHANIE SCHMITTER, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Stephanie Schmitter

STEPHANIE SCHMITTER

J&J COURT TRANSCRIBERS, INC. DATE: November 18, 2010